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No. 88-1756

In The Supreme Court of the United States October Term, 1988

L. STEVEN PLATT,

Petitioner,

v.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION AND BRIEF *AMICUS CURIAE* OF THE CHICAGO COUNCIL OF LAWYERS IN SUPPORT OF THE PETITION FOR CERTIORARI

THOMAS R. MEITES
MEITES, FRACKMAN & MULDER
135 South LaSalle Street
Suite 1425
Chicago, Illinois 60603
(312) 263-0272

THE CHICAGO COUNCIL OF LAWYERS
GEORGE F. GALLAND JR.
DAVIS, BARNHILL & GALLAND
14 West Erie Street
Chicago, Illinois 60610
(312) 751-1170

Attorneys for AMICUS CURIAE

American Reprographics Management, Inc.™ (312) 332-2764

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MOTION AND BRIEF *AMICUS CURIAE* OF THE CHICAGO COUNCIL OF LAWYERS TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

Pursuant to Rule 36.1 of this Court, the Chicago Council of Lawyers respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the petition for certiorari. Movant has been unable to secure the consent of one of the parties to the case in the court of appeals.

The Chicago Council of Lawyers is a bar association of some 1300 members. From its beginning, the Council has concentrated its efforts on the improvement of the judicial

process. The Council believes that the decision below is threatening to lawyers who bring meritorious appeals under the civil rights laws. The council also views the decision below as threatening its members with unfair procedures and unfair sanctions. The Council believes that its views will be helpful to the Court in emphasizing the importance of this petition, notwithstanding the small monetary amount at stake.

Respectfully submitted,

_____

GEORGE F. GALLAND, JR.
Attorney for Movant

DAVIS, BARNHILL & GALLAND
14 West Erie Street
Chicago, Illinois 60610
(312) 751-1170

Date: May 31, 1989

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BRIEF *AMICUS CURIAE* OF THE CHICAGO COUNCIL OF LAWYERS IN SUPPORT OF THE PETITION FOR CERTIORARI

Pursuant to Rule 36.1 of this Court, the Chicago Council of Lawyers respectfully submits this brief *amicus curiae* in support of the petition of L. Steven Platt for a writ of certiorari to the Court of Appeals for the Seventh Circuit.

INTEREST OF THE AMICUS CURIAE

The Chicago Council of Lawyers is a bar association of some 1300 members. It was founded in 1969 and holds a seat in the House of Delegates of the American Bar Association.

From its beginning, the Council has concentrated its efforts on the improvement of the judicial process. It has drawn nationwide attention for its pioneering efforts to evaluate the federal and state judiciary and to improve the functioning of the civil and criminal justice systems. In pursuit of those objectives, the Council has participated as *amicus* in a number of cases before this Court and the lower courts.

The Council takes an interest in this petition from two perspectives. First, the Council has taken an unflagging interest in assuring access to the courts by persons of modest resources, particularly persons with viable claims under the federal civil rights laws. Among other activities, the Council has sponsored a special legal assistance project, Pro Bono Advocates, which provides volunteer attorneys to persons of modest means who have civil rights and other similar claims. While the decision below threatens lawyers in all types of appeals, it is particularly threatening to lawyers who bring meritorious appeals under the civil rights laws, and it is in this kind of case that the Seventh Circuit has been particularly zealous in handing out sanctions.

Second, the Council views the decision below as threatening its members with unfair procedures and unfair sanction. Members of the Council appear with great frequency before the Seventh Circuit. The Council and its member attorneys have grown concerned in recent years at the Seventh Circuit's increasingly aggressive use of attorney sanctions, particularly its insistence on procedural short cuts that lead to ill-considered sanctions on lawyers who are given an inadequate opportunity to show the court why it is wrong.

SUMMARY OF ARGUMENT

The opinion below proclaims an utterly erroneous standard of "frivolous" appeals under F.R.Civ.P. 38. By terming "frivolous" an appeal that "restates arguments properly rejected by the district court," the Seventh Circuit threatens litigants and lawyers with sanctions for taking good-faith appeals that deserve to be taken.

Moreover, in trying to justify its denial of a hearing to petitioner before disciplining him, the opinion adopts a rationale that *delegates to litigants* the Seventh Circuit's power to institute disciplinary proceedings against lawyers under F.R.App.Proc. 46. This unprecedented holding misreads Rule 46, threatens to multiply vexatious disciplinary proceedings, threatens lawyers with unfairness, and demeans the court of appeals itself.

The Seventh Circuit has also erred in creating, for the appellate disciplinary process, an unwritten equivalent of Rule 11 of the Federal Rules of Civil Procedure. Fairness, and the appearance of fairness, preclude sanctioning a lawyer on the basis of a rule that on its face does not apply to the court in question. Moreover, Rule 11's compensatory purposes are poorly adapted to the appellate disciplinary process.

ARGUMENT

While the Council concurs in petitioner's discussion of the errors of the opinion below, this case transcends petitioner's individual plight. The Seventh Circuit has parted company with other Circuits in three crucial holdings: its alarming definition of "frivolous appeals"; its unprecedented delegation *to litigants* of the Court's power to institute disciplinary proceedings against lawyers under F.R.App.Proc. 46; and its adoption of Rule 11 of the Federal Rules of Civil Procedure as a standard for imposing discipline against lawyers in the court of appeals.

A. The Opinion Below Proclaims an Erroneous Standard of "Frivolous" Appeals That Will Chill Meritorious Appeals

An urgent reason for granting the writ is that the opinion below states a clearly erroneous definition of "frivolous" appeals that will frighten lawyers out of bringing good-faith appeals.

The opinion below holds that an argument on appeal is "frivolous" under F.R.App.Proc. 38, and therefore can serve as a predicate for sanctions, "when the appellant merely

restates arguments that the district court properly rejected." Pet. App. 8a.[1] There is absolutely nothing to be said in defense of this definition. Most unsuccessful appeals restate arguments that the district court rejected. Every day, dozens of appellate decisions decide that although the appellant has some good arguments, the district court was nonetheless right to reject them. And there is nothing wrong with "merely restating" such arguments on appeal. Appellants are supposed to restate them. They are not supposed to state arguments on appeal that were *not* considered by the district court.

This Court's recent decision in *Neitzke v. Williams*, ___ U.S. ___, 57 U.S.L.W. 4493 (May 1, 1989), shows how far the Seventh Circuit has gone astray. *Neitzke* interpreted the term "frivolous action" under the federal *in forma pauperis* statute. It held that an action was not "frivolous" merely because it failed to state a cause of action. Instead, only those claims not based on arguable legal or factual theories could be held "frivolous." The Seventh Circuit's definition in petitioner's case cannot be squared with this holding. It makes no reference to whether an appeal raised arguable theories, but depends exclusively on whether the district court was right or wrong. And there is no case for using a more lenient standard of "frivolousness" for disciplining lawyers than for judging *in forma pauperis* petitions.

The Seventh Circuit's erroneous standard puts lawyers on notice that they are at risk of personal sanctions if they fail to persuade the court of appeals that the district court was wrong. This mistaken, but highly visible, standard will inevitably scare lawyers and litigants out of taking good-faith appeals on arguable issues. Equally seriously, this mistaken standard will multiply sanctions litigation. Every appellee who persuades the Court to affirm the reasoning of the district court will be tempted by this opinion to file a post-affirmance motion branding the appeal as "frivolous" and seeking sanctions. No one, least of all the court of appeals, stands

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[1] Citations are to the appendix in the petition for *certiorari*.

to gain from the welter of sanctions litigation that will result from such motions.

B. By Misconstruing F.R.App.Proc. 46, the Opinion Below Delegates to Litigants the Crucial Decision to Initiate Disciplinary Proceedings

The opinion below has worked a revolutionary and mischievous change in disciplinary proceedings against lawyers within the Seventh Circuit. In all Circuits but the Seventh, disciplinary proceedings against a lawyer by a court of appeals are set in motion by the court itself, through the issuance of a rule to show cause. But the Seventh Circuit, through this opinion, has delegated that crucial power – the power to institute disciplinary proceedings – to *litigants*.

This result came about as follows. The Seventh Circuit based its award of sanctions on Rule 46 of the Federal Rules of Appellate Procedure. Pet. App. 8a. That rule governs admission, suspension, disbarment, and disciplinary action against lawyers who practice before the court of appeals. However, Rule 46 provides that disciplinary action against lawyers must be preceded by "reasonable notice and an opportunity to show cause to the contrary, and after hearing if requested." No such hearing was granted petitioner. To defend this denial, the Seventh Circuit's original opinion asserted that notwithstanding the unconditional language of Rule 46, "we have held that a hearing is not required when it would not assist the court in reaching its decision." Pet. App. 10a. The petition for rehearing attacked this indefensible rationale, and the Seventh Circuit's order denying rehearing rightly abandoned that rationale.

But that order then offered a substitute rationale for denying petitioner a hearing, and this substitute only made matters worse. The modified opinion asserted that (1) Rule 46's "reasonable notice" of disciplinary action had been satisfied by the footnote in appellee's brief requesting sanctions against appellant and his lawyer; and (2) after receiving this "reasonable notice," appellant's lawyer had a chance at oral argument to defend his conduct, and has not "requested" a hearing before the court. Pet. App. 13a-14a.

Thus, according to the Seventh Circuit, disciplinary proceedings under Rule 46 were formally instituted against petitioner by a request for sanctions in a footnote to an appellee's brief. The Seventh Circuit says that this footnote constituted "reasonable notice of disciplinary action and an opportunity to show cause to the contrary" under Rule 46.

This holding, improvised to replace the court's untenable original rationale, has shocked members of the Seventh Circuit bar. The rationale has no legal merit. Rule 46's "reasonable notice" means notice *from the court of appeals*, not notice from a litigant.

The effect of the Seventh Circuit's unprecedented "notice" holding is that the Court has delegated to litigants its power to initiate disciplinary proceedings. A request for sanctions in a litigant's brief now automatically sets disciplinary proceedings in motion. A lawyer in the Seventh Circuit who reads in his opponent's brief a request for sanctions now must consider disciplinary proceedings to have begun, and to be at risk of punishment by the Seventh Circuit. To protect himself or herself, the lawyer will have to request a hearing, and will have to devote a substantial portion of the brief dealing not with the client's case on the merits, but with the question of whether he or she should be disciplined.

For three reasons, this result is deplorable. First, it demeans the court of appeals. The Seventh Circuit has tossed into the laps of litigants its solemn power to institute disciplinary proceedings. Likewise, this result will demean the appellate process. Appeals on the merits of litigants' cases will routinely be accompanied by unseemly fights over whether lawyers should be disciplined.

Second, delegating to litigants the power to start disciplinary proceedings will multiply vexatious disciplinary proceedings. Litigants who are given the power to start such proceedings against an opposing litigant's lawyer are likely to take advantage of that power.

Third, delegating the institution of disciplinary proceedings to litigants is sure to compromise the fairness of those

proceedings. Litigants have no incentive to be fair to their adversary's counsel. The present case vividly shows what can happen as a result. The disciplinary procedure against petitioner (which resulted in a fine payable to the court) should have been initiated by a clear statement from the court of what he might have done wrong, made in a fashion that informed him that he faced a serious risk of discipline, and telling him what he had to do to counter the charges. Petitioner got nothing of the sort. Instead, the proceedings against him were initiated by a snarling argument in a footnote in his opponent's brief, based (as the petition for certiorari shows) on a single alleged misrepresentation. And, when the court of appeals apparently concluded that a single misstatement was not enough to warrant discipline, the court, without *any* notice to petitioner, went searching through the record for more. As a result, it ended up basing the discipline on its own misquotation of petitioner's brief. Petitioner was thereby socked with a fine for an alleged offense he never received notice of.

C. The Seventh Circuit Erred in Grafting Rule 11 onto the Appellate Disciplinary Process

As the petition for *certiorari* points out, the decision below aggravates an existing split among the Circuits as to whether Rule 11 of the Federal Rules of Civil Procedure applies to papers filed in the courts of appeals. See petition at 9-10. *Amicus* believes that the Seventh Circuit's approach — which decrees that conduct violating Rule 11 is "conduct unbecoming a member of the bar" under F.R.App.Proc. 46 — is unwarranted and unwise.

First, it *looks* unfair to discipline lawyers for violation of a rule that on its face does not apply to the court in question. The Seventh Circuit underrates the importance of preserving the appearance of fairness in its dealings with lawyers. (This attitude has been reflected in other aspects of the Seventh Circuit's recent decisions on sanctions: for example, in its assertion that it can dispense with Rule 46's mandatory hearing requirement if it does not feel that a hearing would "be helpful to the Court" (see *Hill v. Norfolk & Western Ry.*

Co., 814 F.2d 1192 (7th Cir. 1987)), and in its holding below allowing disciplinary proceedings to be initiated against a lawyer by a footnote in an appellee's brief.) The Seventh Circuit's vigilant campaign to increase the level of appellate advocacy needs to be accompanied by an equally vigilant campaign to preserve the appearance of fairness. Most lawyers think that being fined on the basis of an unwritten rule is unfair.

Second, if Rule 46 of the Federal Rules of Appellate Procedure is to be amended to provide a specific standard, it is by no means apparent that F.R.Civ.Proc. 11 is the right standard. In the opinion of *amicus*, Rule 11 is poorly tailored to the appellate disciplinary process. Rule 11 is not a disciplinary rule at all, but a rule of civil procedure designed to compensate the opposing party. F.R.App.Proc. 46, in contrast, is a disciplinary rule regulating the status of attorneys before the bar of the court of appeals. The two rules therefore serve different purposes. The standards for one are not necessarily appropriate for the other. Some conduct deserves Rule 11 compensatory sanctions but is not disciplinable; some conduct deserves discipline but not Rule 11 sanctions. (The present case furnishes an example of conduct that, even if "disciplinable," could not have justified a $1,000 compensatory award under Rule 11, because the union defendant spent no substantial sum in briefly protesting petitioner's allegedly inaccurate statement in the footnote to its brief.)

More generally, it may be unwise to set a general rule making inadvertent misstatements a basis for Rule 46 discipline. One can imagine an overwhelmingly successful appeal in which the appellant nonetheless slips and makes one untrue statement. It is far from apparent that such a mistake, which could be sanctionable in a district court under Rule 11, should be disciplined under Rule 46.

In short, there are strong arguments that Rule 46 should not be amended to include the substance of Rule 11. In the meantime, Rule 46 says nothing of Rule 11, and Rule 11 says that it applies to the *district* courts. Petitioner's fine, on the basis on an unwritten rule, therefore looks unfair, and in fact was unfair.

CONCLUSION

Amicus curiae respectfully requests that the petition for certiorari be granted and that the judgment of the court below be reversed.

Respectfully submitted,

THOMAS R. MEITES
MEITES, FRACKMAN & MULDER
135 South LaSalle Street
Suite 1425
Chicago, Illinois 60603
(312) 263-0272

THE CHICAGO COUNCIL OF LAWYERS
GEORGE F. GALLAND JR.
DAVIS, BARNHILL & GALLAND
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Attorneys for AMICUS CURIAE